

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Keyne Jean Villert	Team: Squad #14	CCRB Case #: 201403417	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input checked="" type="checkbox"/> Injury
Incident Date(s) Tuesday, 04/01/2014 9:03 PM	Location of Incident: In front of 940 East 163rd Street, and inside the 41st Precinct stationhouse	Precinct: 41	18 Mo. SOL 10/1/2015	EO SOL 10/1/2015	
Date/Time CV Reported Tue, 04/01/2014 3:55 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Wed, 04/09/2014 10:39 AM		

Complainant/Victim	Type	Home Address
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

Witness(es)	Home Address
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

Subject Officer(s)	Shield	TaxID	Command
1. SGT Logan Lefkowitz	02702	930551	041 PCT
2. POM Carlos Cruz	03361	948830	041 PCT
3. Officers			041 PCT
4. POM Jose Reyes	23643	945394	041 PCT
5. POM Jose Almonte	04137	952401	049 PCT
6. POM Joel Boyce	05937	941448	041 PCT
7. POM Scott Berger	10210	948659	041 PCT
8. An officer			Unknown

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM John Giesen	03294	917680	041 PCT
2. POM Richard Polidoro	10405	927366	041 PCT
3. POM Ramon Salcedo	16125	939405	041 PCT

Officer(s)	Allegation	Investigator Recommendation
A . POM Jose Reyes	Abuse of Authority: In front of 940 East 163rd Street in the Bronx, PO Jose Reyes stopped § 87(2)(b) [REDACTED].	A . § 87(2)(g) [REDACTED]
B . POM Joel Boyce	Abuse of Authority: In front of 940 East 163rd Street in the Bronx, PO Joel Boyce stopped § 87(2)(b) [REDACTED].	B . § 87(2)(g) [REDACTED]

Officer(s)	Allegation	Investigator Recommendation
C . POM Jose Reyes	Force: In front of 940 East 163rd Street in the Bronx, PO Jose Reyes used a chokehold against § 87(2)(b) .	C . § 87(2)(g)
D . POM Jose Reyes	Force: In front of 940 East 163rd Street in the Bronx, PO Jose Reyes restricted the breathing of § 87(2)(b) .	D . § 87(2)(g)
E . POM Scott Berger	Force: In front of 940 East 163rd Street in the Bronx, PO Scott Berger used physical force against § 87(2)(b) .	E . § 87(2)(g)
F . POM Jose Reyes	Force: In front of 940 East 163rd Street in the Bronx, PO Jose Reyes used physical force against § 87(2)(b) .	F . § 87(2)(g)
G . POM Carlos Cruz	Force: Inside the 41st Precinct stationhouse, PO Carlos Cruz used physical force against § 87(2)(b) .	G . § 87(2)(g)
H . POM Jose Almonte	Force: Inside the 41st Precinct stationhouse, PO Jose Almonte used a chokehold against § 87(2)(b) .	H . § 87(2)(g)
I . Officers	Force: Inside the 41st Precinct stationhouse, officers used physical force against § 87(2)(b) .	I . § 87(2)(g)
J . SGT Logan Lefkowitz	Force: Inside the 41st Precinct stationhouse, Sgt. Lefkowitz used a taser against § 87(2)(b) .	J . § 87(2)(g)
K . An officer	Force: Inside the 41st Precinct stationhouse, an officer tightly handcuffed § 87(2)(b) .	K . § 87(2)(g)
L . POM Jose Reyes	Other: PO Jose Reyes provided a false statement.	L . § 87(2)(g)

### Case Summary

On April 1, 2014, at approximately 9:03 p.m., § 87(2)(b) and his friend, § 87(2)(b) were in front of 940 East 163<sup>rd</sup> Street in the Bronx. PO Jose Reyes and PO Joel Boyce from the 41<sup>st</sup> Precinct stopped § 87(2)(b) (**Allegations A and B**). PO Reyes and PO Boyce were backed up by multiple unidentified officers. During the stop, PO Reyes grabbed the collar of § 87(2)(b)'s hoodie and allegedly pressed it against his throat, restricting his breathing (**Allegations C and D**). At some point, PO Scott Berger and PO Brittany McGee, both also from the 41<sup>st</sup> Precinct, and multiple unidentified officers arrived at the scene. PO Reyes, PO Boyce, and some unidentified officers then pulled § 87(2)(b) down to the ground. There, PO Berger participated in the handcuffing of § 87(2)(b) and allegedly repeatedly punched him in the head (**Allegation E**). § 87(2)(b) was eventually handcuffed and then placed into a marked patrol car, where PO Reyes also allegedly repeatedly punched him in the face (**Allegation F**). § 87(2)(b) and § 87(2)(b) were arrested, transported to the 41<sup>st</sup> Precinct stationhouse, and placed in a holding cell with other prisoners, including § 87(2)(b) and § 87(2)(b).

At some point, § 87(2)(b) spat at PO Cruz who then entered the cell and allegedly pushed him against a nearby wall (**Allegation G**). § 87(2)(b) then attempted to aid § 87(2)(b) and was immediately restrained with an alleged headlock by PO Jose Almonte from the 41<sup>st</sup> Precinct (**Allegation H**). PO Cruz then brought § 87(2)(b) down to the floor and allegedly repeatedly punched him in the head (**within Allegation G**). Multiple unidentified officers also allegedly kicked § 87(2)(b) and an unidentified officer allegedly pulled his right pinky finger back, causing a fracture there (**Allegation I**). During that time, an officer identified via investigation as Sgt. Logan Lefkowitz, also from the 41<sup>st</sup> Precinct, used a Taser gun against § 87(2)(b) (**Allegation J**). § 87(2)(b) was later handcuffed and placed inside another holding cell within the stationhouse. There, an unidentified officer allegedly further tightened § 87(2)(b)'s handcuffs, causing pain and bleeding to his wrists (**Allegation K**). § 87(2)(b) was eventually transported to § 87(2)(b), where his injuries were treated.

This case was assigned to the undersigned investigator on April 23, 2014. On May 21, 2014, Assistant District Attorney (ADA) Allison Cerilli from the Bronx District Attorney's Office requested the case be placed on hold pending the conclusion of her investigation. On April 30, 2015, the Bronx District Attorney's Office lifted the hold and the CCRB resumed its investigation.

This case was added to the CCRB's Sensitive Case List after news coverage § 87(2)(b)

(See Board Review 01).

### Mediation, Civil and Criminal Histories

- This complaint was unsuitable for mediation because § 87(2)(b) was arrested and seriously injured.
- § 87(2)(b) and § 87(2)(b) who are represented by attorney § 87(2)(b) each filed a notice of claim with the City of New York on § 87(2)(b), claiming that they were assaulted and falsely arrested, and seeking one million dollars as redress (See Board Review 02).
- The transcript of § 87(2)(b)'s 50-h hearing from § 87(2)(b), § 87(2)(a) Gen.Mun. §50-H(3)

- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

### Civilian and Officer CCRB Histories

- This is the first CCRB complaint involving § 87(2)(b) and the second CCRB complaint involving § 87(2)(b) § 87(2)(b)

§ 87(2)(b)

- PO Reyes has been a member of the service for seven years and there are no substantiated allegations against him. In one other CCRB case, PO Reyes was listed as the subject of a physical force allegation that was closed as complainant uncooperative.
- PO Boyce has been a member of the service for eight years. There are no substantiated allegations against him § 87(2)(g)
- PO Berger has been a member of the service for four years. Two force allegations, one offensive language allegation, and one abuse of authority allegation have been substantiated against him. PO Berger has also been listed as the subject of seven other force allegations, which were closed as exonerated, unsubstantiated, complaint withdrawn, and complainant unavailable.
  - In case 201104672, a stop allegation was substantiated against PO Berger. The CCRB recommended Charges. The NYPD did not take disciplinary action with respect to this allegation, § 87(4-b) § 87(2)(g)
  - In case 201211421, allegations that PO Berger pointed his gun, used physical force, cursed, and made an offensive remark were substantiated. The CCRB recommended Charges and noted other misconduct for a false official statement. The disciplinary proceedings for this case are on-going.
- PO Cruz has been a member of the service for four years. One abuse of authority and one force allegation have been substantiated against him. He was also listed as the subject of three other force allegations, which were closed as unsubstantiated, complaint withdrawn, and victim uncooperative.
  - In case 201201037, stop and physical force allegations were substantiated against PO Cruz. The Board recommended Charges. The NYPD issued a Command Discipline.
- PO Almonte has been a member of the service for two years and has no prior CCRB complaints.
- Sgt. Lefkowitz has been a member of the service for twelve years and has no prior CCRB complaints.

### Police Documents

Documents were requested from the 41<sup>st</sup> Precinct, the Internal Affairs Bureau, the Communications Division and the Monitoring and Analysis Section in order to confirm which officers responded, the reasons for the stop and arrest, and a chronology of the events. The documents confirmed the identification of the officers who were present at the arrest location and at the stationhouse. However, 41<sup>st</sup> Precinct documents indicate that there were several officers within the 41<sup>st</sup> Precinct whose pedigree information and assignments may have matched the description of the officer who allegedly tightened § 87(2)(b)'s handcuffs. Ultimately the information contained in these documents was insufficient to identify this subject officer. For a detailed review of these documents, see Board Review 36 and 07-15.

### Medical Records

On the incident date at 11:15 p.m., § 87(2)(b) was evaluated by Emergency Medical Services personnel, at which point he stated that he was “jumped by the police” and he complained of pain to the right side of his face and his jaw. Bruising and swelling to the left and right sides of his face are noted, as well as a minor abrasion to his forehead. § 87(2)(b) is noted as having been physically incapable to sign the Prehospital Care Report Summary.

On the incident date at 11:58 p.m., § 87(2)(b) arrived at § 87(2)(b) § 87(2)(b) complained that officers hit him several times in the face and that he was shocked with a Taser gun three times. § 87(2)(b) also complained of pain to the right side of the face and jaw, the forehead, and right pinky. § 87(2)(b) was diagnosed with multiple abrasions and swelling to the face, neck, back, and right wrist. X-ray examinations of his right hand, which was later wrapped with a bandage, revealed negative results for any acute fractures. § 87(2)(b)'s right pinky finger was, however, noted as tender, and a superficial abrasion with dried blood was noted of his right wrist.

### Video Footage

§ 87(2)(b)'s attorney provided the two copies of footage from a surveillance system near the incident location. The footage is summarized below. Files 201403417\_20140527\_1141\_DM.MOV and 201403417\_20140527\_1142\_DM.MOV are attached to IAs 39 and 40, and a detailed transcription is attached to Board Review 19.

The footage shows § 87(2)(b) and other unidentified individuals in front of a building. § 87(2)(b) is wearing a blue hoodie and dark pants and has his right hand concealed in one of his front pockets. His other hand is visible and holding a cigarette. § 87(2)(b) walks away from the building, and out of the view of the camera, and then walks back, returning to the front of the building. A police car arrives and approximately five uniformed officers exit. PO Reyes and PO Boyce approach § 87(2)(b) and PO Reyes pushes § 87(2)(b) back toward the building. As § 87(2)(b) steps back, he removes his right hand from his pocket and raises it up momentarily. PO Reyes pushes § 87(2)(b) against the façade of the building and holds him by the collar area of his hoodie with two hands for approximately six seconds, pulling and pushing him while still holding his collar. During this time, § 87(2)(b)'s head jerks back and forth. PO Reyes releases § 87(2)(b) but then grabs and restrains him again in a similar manner. PO Boyce also approaches during this struggle. When § 87(2)(b) is restrained the first time, he extends his arm toward PO Reyes. When § 87(2)(b) is restrained the second time, he repeatedly moves his arms toward PO Reyes and pushes PO Boyce back. PO Reyes then releases § 87(2)(b) and additional uniformed officers arrive. Two of these officers approach § 87(2)(b) and together with PO Reyes and PO Boyce, pull him to the ground and restrain him. PO Berger then approaches and appears to help restrain § 87(2)(b) but his specific actions are not visible. Multiple other officers, including PO McGee, conduct crowd control as by-standers, including § 87(2)(b) attempt to approach the struggle. Eventually, § 87(2)(b) is lifted from the ground and escorted away. The footage does not show § 87(2)(b) concealing either of his hands again after initially removing his right hand from his pocket.

### Potential Issues

- Attempts to Obtain Additional Civilian Statements: Attempts to reach § 87(2)(b) to have him view photos were unsuccessful. Attempts to interview § 87(2)(b) and § 87(2)(b) at the CCRB and to obtain the transcript of § 87(2)(b)'s 50-h hearing have been unsuccessful. However, the CCRB took a phone statement from § 87(2)(b) and obtained the transcripts of § 87(2)(b) and § 87(2)(b)'s interviews with the Bronx DA's Office (See Board Review 17 and 18). ADA Aloia from the Bronx DA's office offered to send the transcripts of additional witness interviews, but has not yet done so. Follow-up attempts in regard have been unsuccessful. Attempts to interview other identified witnesses were unsuccessful, and field work conducted to canvass for additional witnesses and video evidence was also unsuccessful.
- Attempts to Obtain Additional Officer Statements: ADA Aloia explained her office does not record interviews with officers. IAB noted that, as of June 10, 2015, the request for PO Reyes' GO-15 was still pending approval by the NYPD Legal Bureau. Many of the potential witness officers could not be identified and thus could not be interviewed. Some officers who were identified as being present were not interviewed. PO McGee was conducting crowd control at the arrest location and had her view of the allegations blocked by the other officers. § 87(2)(g)

### Findings and Recommendations

#### Explanation of Subject Officer Identification:

The video evidence, in combination with the testimonies of PO Reyes and PO Boyce confirmed their

roles in the stop and apprehension of § 87(2)(b) § 87(2)(g) PO Berger did not recall what actions he took at the arrest location. However, he was assigned to the Anti-Crime unit that assisted in the arrest and video evidence indicates that an officer with his pedigree arrived at the same time as PO McGee, who was also assigned to that Anti-Crime unit. Furthermore, he matches the description of the plainclothes officer who allegedly repeatedly punched § 87(2)(b) § 87(2)(g) PO Cruz and Sgt. Lefkowitz confirmed their roles in the incident at the stationhouse. § 87(2)(g) PO Almonte's testimony, in combination with the affidavit in support of declining/deferring prosecution and the fact that his pedigree information matches the subject officer's, confirmed his role in restraining § 87(2)(b) § 87(2)(g) was unable to describe the officers who allegedly repeatedly kicked him at the stationhouse or pulled his finger back. Several officers match the description of the officer that allegedly tightened § 87(2)(b) s handcuffs. § 87(2)(g)

### **Allegations Not Pleaded:**

**Abuse of Authority:** No frisk or search allegation is pleaded. Although § 87(2)(b) said in his phone statement that he was frisked and searched, he did not allege this in any of his other statements. Additionally, no other party mentioned these allegations and the video evidence shows no indication that this occurred before § 87(2)(b) was arrested.

**Abuse of Authority:** No threat of arrest is pleaded against PO Reyes. None of the civilians alleged a threat, and although PO Reyes acknowledged that he warned § 87(2)(b) he could be arrested, the investigation determined this was a statement of fact.

**Force:** No additional force against PO Reyes is pleaded in regard to him pushing § 87(2)(b) toward a wall at the initiation of the stop. § 87(2)(g)

**Abuse of Authority:** No threat of force is pleaded. § 87(2)(b) the alleged victim of the threat, did not allege this, and § 87(2)(b) who reported it, was inconsistent about the details of it in his statements.

**Force:** No restriction of breathing allegation is pleaded for § 87(2)(b) because none of the evidence indicates that his breathing was restricted as a result of the alleged headlock. As mentioned above, all attempts to interview § 87(2)(b) were unsuccessful.

**Force:** No force with a blunt instrument is pleaded because no interviewed party, including the alleged victim, corroborated § 87(2)(b) s statement in regard to such force having taken place.

**Force:** No pepper-spray allegation is pleaded because none of the other civilians or officers corroborated § 87(2)(b) s claim that pepper-spray was used at the stationhouse and it appears likely that in § 87(2)(b) s retelling of the incident, he confused the use of the Taser with the use of pepper-spray.

**Allegation A – Abuse of Authority: In front of 940 East 163<sup>rd</sup> Street in the Bronx, PO Jose Reyes stopped § 87(2)(b)**

**Allegation B – Abuse of Authority: In front of 940 East 163<sup>rd</sup> Street in the Bronx, PO Joel Boyce stopped § 87(2)(b)**

It is undisputed that § 87(2)(b) a white Hispanic man, was in front of 940 East 163<sup>rd</sup> Street at the initiation of this incident. It is also undisputed that PO Reyes and PO Boyce responded to a call of a man with a firearm in front of 940 East 163<sup>rd</sup> Street. It is further undisputed that PO Reyes and PO Boyce

approached § 87(2)(b)'s left and right sides, respectively, at the same time and stopped him. Lastly, it is undisputed that § 87(2)(b) had one of his hands inside one of his front pockets at the initiation of the stop and that PO Reyes first gave him an order to take the hand out.

§ 87(2)(b) said he was wearing a solid turquoise hoodie with red, white, and black designs on its front pocket, as well as blue jeans and construction boots. The video footage and the photograph of § 87(2)(b)'s hoodie indicate it was blue (See Board Review 26).

PO Reyes stated that the call described the suspect as a white man wearing a green shirt, black jeans, and brown boots, and that § 87(2)(b) matched that description. PO Reyes explained that the officers arrived at the scene less than five minutes following the call. PO Reyes noted in his memo book that § 87(2)(b) matched the description of a white man with a firearm wearing a green shirt, black jeans, and brown boots. PO Reyes described § 87(2)(b)'s hoodie as green-colored, but later stated that it was teal-colored at the suggestion of his attorney. PO Reyes viewed the photograph of the hoodie and confirmed that the coloring depicted on the picture was accurate. PO Reyes added that he and PO Boyce tactically approached § 87(2)(b) from opposite sides for safety purposes.

PO Boyce corroborated that § 87(2)(b) matched the description of the suspect provided over the radio. However, PO Boyce did not remember the description. When asked whether § 87(2)(b) exactly matched the description, he replied, "I wouldn't say it was a exact fit, but uhm in front of the location and maybe certain details at the time made us approach him."

The Event Information Report and the 911 call indicate that at 8:20 p.m., an identified caller provided a description of a black man with a gun wearing a green jacket, green scarf, black jeans, and brown boots in front of 940 East 163<sup>rd</sup> Street. In the subsequent radio communications, this description of the suspect was accurately and repeatedly reported. The report indicates that five minutes after the 911 call, PO Reyes and PO Boyce arrived at the incident location. (See Board Review 08). The 911 call and radio communications are located in files 201403417\_20150629\_1315\_DM.wav and 201403417\_20150629\_1315A\_DM.wav and are attached to IAs 367 and 368.

The video shows that PO Boyce apparently spoke with § 87(2)(b) before PO Reyes made any attempt to handcuff him. It also shows that PO Boyce actively participated in the restraining and apprehension of § 87(2)(b) (See Board Review 19)

The handwritten Stop, Question and Frisk Report filed by PO Reyes indicates that § 87(2)(b) was suspected of engaging in the criminal possession of a weapon, that he was stopped based on his fitting of a description and his use of furtive movements, and that no other individual was stopped. § 87(2)(b) is listed as having stated, "I'm not taking my hands out my pocket." Changing of direction at the sight of officer or flight is listed as an additional circumstance or factor. (See Board Review 10)

The Court of Appeals of New York held in People v. Debour, 40 N.Y.2d 210 (1976), that officers can forcibly stop and detain an individual based on a reasonable suspicion that he has committed, is committing, or is about to commit a crime (See Board Review 27). People v. Dubinsky, 289 A.D.2d 415 (2001) held that vague and general descriptions are not sufficient to constitute reasonable suspicion, even when there is some temporal proximity to the offense and the officers see the suspect walking towards the location of the offense (See Board Review 34).

In addition, People v. Moore, 93 A.D.3d 519 (1<sup>st</sup> Dept. 2012) held that an interaction is raised to a seizure whenever physical force is used, or if no physical force is used, the person is submitted to the assertion of authority (See Board Review 28).

Similarly, People v. Bora, 83 N.Y.2d 531 (1994) held that the number of officers involved in an incident may, along with other factors, lead a reasonable person to believe that the "officers' conduct was a significant limitation on his or her freedom," resulting in a stop (See Board Review 29).

§ 87(2)(g)

§ 87(2)(g)

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§ 87(2)(g)

**Allegation C – Force: In front of 940 East 163<sup>rd</sup> Street in the Bronx, PO Jose Reyes used a chokehold against § 87(2)(b)**

**Allegation D – Force: In front of 940 East 163<sup>rd</sup> Street in the Bronx, PO Jose Reyes restricted the breathing of § 87(2)(b)**

**Allegation F – Force: In front of 940 East 163<sup>rd</sup> Street in the Bronx, PO Jose Reyes used physical force against § 87(2)(b)**

§ 87(2)(b) stated that PO Reyes grabbed him by the collar of the hoodie and then pulled the collar up, causing it to press against his neck and restrict his breathing. § 87(2)(b) also alleged that PO Reyes repeatedly punched him inside the patrol car. § 87(2)(b) consistently reported the allegations of force discussed here throughout his statements.

§ 87(2)(b) alleged that PO Reyes placed § 87(2)(b) in a chokehold with a forearm and later punched him in the face while inside the patrol car.

§ 87(2)(b) indicated that she was not present at the time of the alleged chokehold and that she did not witness the alleged force inside the patrol car. Instead, § 87(2)(b) stated that she may have been informed by § 87(2)(b) that he had been struck there. (See Board Review 21).

PO Reyes admitted to grabbing § 87(2)(b) by the collar of his hoodie. PO Reyes denied that he was aware of § 87(2)(b)'s collar having been pressed against his neck. PO Reyes explained that he only remembered having grabbed and held on § 87(2)(b)'s hoodie, and then having pushed him against the storefront. PO Reyes denied that § 87(2)(b) complained about his breathing being restricted. PO Reyes explained that § 87(2)(b) bit his hand inside the patrol car, at which point he pushed § 87(2)(b)'s face away. PO Reyes denied having punched § 87(2)(b).

PO Boyce did not remember whether he saw PO Reyes pull § 87(2)(b)'s hoodie up. PO Boyce did not know whether the hoodie of § 87(2)(b) was pressed against his throat. PO Boyce explained that he and an unidentified officer held § 87(2)(b) down inside the patrol car. PO Boyce did not remember



observing the unidentified officer use any additional force against § 87(2)(b) PO Boyce made no mention of § 87(2)(b) having bit an officer. PO Boyce denied having observed any officer punch § 87(2)(b) PO Boyce did not hear § 87(2)(b) complain about his breathing being restricted.

Each of the additional officers interviewed denied having been present for this incident, remembering this incident, or having observed the stop and apprehension of § 87(2)(b)

Video evidence indicates that PO Reyes grabbed § 87(2)(b)'s collar, pulled him back, and then pushed him against the storefront while maintaining the hold on his collar, which lasted approximately six seconds. During that time, § 87(2)(b)'s head jerked back and forth.

According to Patrol Guide section 203-11, officers will not use chokeholds. This includes any pressure to the throat or windpipe that may prevent or hinder breathing or reduce the intake of air (See Board Review 35).

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation E – Force: In front of 940 East 163<sup>rd</sup> Street in the Bronx, PO Scott Berger used physical force against § 87(2)(b)**

§ 87(2)(b) alleged that, after he was brought down to the ground, PO Berger punched him in the head four or five times. § 87(2)(b) corroborated that the officers brought § 87(2)(b) down to the ground, handcuffed him, and then wrestled with one of his arms, but denied that the officers took any additional actions while § 87(2)(b) was down.

PO Berger did not remember what actions he took during the incident. The other officers who were interviewed all denied observing PO Berger punch § 87(2)(b) or denied being present for the incident.

The video indicates that PO Berger assisted four officers with restraining § 87(2)(b) down immediately after he was brought down to the ground. PO Berger's actions toward § 87(2)(b) are not visible due to the view of his person being obstructed by other officers. The video indicates that § 87(2)(b)

§ 87(2)(b) repeatedly attempted to approach the struggle but that other officers repeatedly pushed him further away, stood in front of him, or otherwise kept him from approaching any further.

The arrest photographs taken show redness and bruising to § 87(2)(b)'s forehead and both sides of his face (See Board Review 12). His mug shot pedigree lists bruising to his right cheek and forehead (See Board Review 12). The medical records indicate that § 87(2)(b) sustained bruising and swelling to the right side of his face. These injuries appear consistent with having been punched multiple times.

Although some parts of § 87(2)(b)'s testimony have been cast into doubt by other evidence uncovered during the investigation, he was consistent about the fact that an officer punched him in the face during his arrest. That neither § 87(2)(b) nor the other officers testified to observing PO Berger strike § 87(2)(b) can be explained by the fact that numerous officers were surrounding § 87(2)(b) at the time and potentially obstructed their view of the struggle.

§ 87(2)(b) also provided a detailed description of the subject officer, which closely matches PO Berger. § 87(2)(b) singled this officer out from all the other officers involved in the arrest, despite the fact that he arrived at the scene after § 87(2)(b) had been brought down. § 87(2)(b) made no allegation that these other officers used excessive force against him on the ground, and instead indicated that they only pinned him down and handcuffed him. That § 87(2)(b) did not blindly or erroneously fabricate allegations against all the officers who apprehended him, but instead made a specific allegation against PO Berger, supports the conclusion that this allegation was motivated by an actual instance of misconduct, rather than a mere desire to retaliate against the officers.

Finally, when given the opportunity, PO Berger did not deny that he punched § 87(2)(b) and only denied remembering what actions he took. § 87(2)(g) PO Berger has previously been listed as the subject officer of nine other force allegations, two of which were substantiated by the CCRB, despite his short four-year tenure as an officer. § 87(2)(g)

§ 87(2)(g)

According to Patrol Guide section 203-11, only the amount of force necessary to overcome resistance will be used to effect an arrest (See Board Review 30). Additionally, PD v. Danahy, OATH Index No. 1923/00 (2000), held that an officer used excessive force against a flailing civilian on the floor by striking him with his fists and with a blunt object, explaining that the civilian did not resist with the kind of force that would have justified the use of strikes by the officer (See Board Review 31).

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation G – Force: Inside the 41<sup>st</sup> Precinct stationhouse, PO Carlos Cruz used physical force against § 87(2)(b)**

It is undisputed that a struggle took place inside the holding cell, during which § 87(2)(b) was brought down to the floor.

§ 87(2)(b) stated that PO Cruz entered the cell and immediately pushed him against a nearby wall. § 87(2)(b) explained that PO Cruz then pulled him down, pinned him down, and repeatedly punched him in the head and right side of the face. § 87(2)(b)'s arrest photo and medical records indicate that he sustained bruising and swelling to his face.

§ 87(2)(b) said that the officers first unsuccessfully tried to handcuff § 87(2)(b) and then brought him down. § 87(2)(b) denied that a "big fight" took place and said § 87(2)(b) was not punched.

§ 87(2)(b) stated that § 87(2)(b) first punched PO Cruz, who then punched him back. § 87(2)(b) then observed § 87(2)(b) be pushed down to the floor. § 87(2)(b) added that § 87(2)(b) continued fighting until he was pepper-sprayed, which as discussed above § 87(2)(b) confused for his being shocked with a Taser gun. § 87(2)(b) did not observe any further fighting. (See Board Review 22 and 23).

§ 87(2)(b) stated, on behalf of § 87(2)(b) that § 87(2)(b) was repeatedly punched and kicked by multiple officers for approximately five minutes. § 87(2)(b) added that § 87(2)(b) could not see whether § 87(2)(b) resisted.

Each of the interviewed officers denied having punched, or having observed an officer do so. Officer statements also indicate that § 87(2)(b) first punched or attempted to bring down PO Cruz, at which point he was brought down. Officer statements also indicate that § 87(2)(b) continued resisting, but in a passive manner, while down and did not stop doing so until after he was shocked with a Taser gun. The statements detailed that § 87(2)(b) resisted while down when he failed to voluntarily give his hands to the officers by either keeping them close to or placing one of them underneath his body.

According to Patrol Guide section 203-11, only the amount of force necessary to overcome resistance will be used to effect an arrest (See Board Review 35).

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation H – Force: Inside the 41<sup>st</sup> Precinct stationhouse, PO Jose Almonte used a chokehold against § 87(2)(b)**

§ 87(2)(b) stated that he observed PO Almonte restrain § 87(2)(b) with a headlock, placing an arm around § 87(2)(b)'s neck, and then push § 87(2)(b) down.

The CCRB was unable to obtain a statement from § 87(2)(b). In § 87(2)(b)'s interview with the

Bronx DA's office, he made no indication that he was placed in a headlock. However, it should be noted that the focus of the Bronx DA's investigation was in regard to allegations that officers falsely arrested and used excessive force against § 87(2)(b) § 87(2)(g)

§ 87(2)(g)

During PO Almonte's interview, he stated that he prevented § 87(2)(b) from grabbing PO Cruz. When asked to describe how he did this, PO Almonte physically demonstrated by lifting his arm and placing his forearm away from and in front of his body, parallel to his torso. However, PO Almonte then verbally explained that he grabbed § 87(2)(b)'s arm, pulled it behind his back, and they fell down together. PO Almonte denied placing § 87(2)(b) in a headlock or having made contact with his neck area.

Each of the additional officers interviewed denied having observed the struggle involving § 87(2)(b)

The command log (See Board review 25) does not list PO Almonte as § 87(2)(b)'s arresting officer.

The affidavit in support of declining/deferring prosecution (See Board review 13) indicates that after having observed § 87(2)(b) approach PO Cruz, PO Almonte pulled him back and then to the ground.

Patrol Guide section 203-11 prohibits officers from using chokeholds, including any pressure to the throat or windpipe that may prevent or hinder breathing or reduce intake of air (See Board Review 35).

§ 87(2)(g)

§ 87(2)(g)

#### **Allegation I – Force: Inside the 41<sup>st</sup> Precinct stationhouse, officers used physical force against**

§ 87(2)(b)

§ 87(2)(b) alleged that, after he was brought to the floor of the holding cell, multiple unidentified officers, who he could not describe, repeatedly kicked him in the left arm and face.

§ 87(2)(b) also consistently alleged that an officer pulled his right pinky finger back, causing a fracture to it. At the time of his verified statements to the CCRB and the District Attorney's Office (See Board Review 16), § 87(2)(b) stated that this occurred at the stationhouse. However, § 87(2)(b) stated in his phone statement to the CCRB § 87(2)(a) Gen.Mun. §50-H(3) that this occurred at his arrest location (See Board Review 03 and 20).

As mentioned above, § 87(2)(b) denied that a "big fight" took place. § 87(2)(b) also indicated that § 87(2)(b) was not kicked. § 87(2)(b) added that officers attempted to break § 87(2)(b)'s fingers by bending them at the arrest location. Additionally, § 87(2)(b) indicated that he did not observe § 87(2)(b) be kicked. However, § 87(2)(b) reported that § 87(2)(b) was repeatedly kicked by multiple officers for approximately five minutes.

Each of the interviewed officers either denied having kicked § 87(2)(b) having observed any officer do so, or remembering this incident. Similarly, they also either denied having pulled back § 87(2)(b)'s finger, having observed any officer do so, or remembering this incident.

The medical records indicate that an x-ray of § 87(2)(b)'s finger revealed no acute fracture, but that his right hand was nevertheless bandaged. The records do indicate that the finger was tender.

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation J – Force: Inside the 41<sup>st</sup> Precinct stationhouse, Sgt. Logan Lefkowitz used a Taser against § 87(2)(b)**

It is undisputed that § 87(2)(b) was shocked with a Taser gun after he was brought down to the floor. It is also undisputed that § 87(2)(b) resisted on the floor by failing to voluntarily give his hands to the officers. It is further undisputed that several officers were present inside the cell during that time.

§ 87(2)(b) said he fell stomach down, was pinned down by PO Cruz, and was then shocked. § 87(2)(b) denied resisting while down. § 87(2)(b) corroborated that § 87(2)(b) was shocked after he was brought down. § 87(2)(b) alleged that § 87(2)(b) was shocked five or six times and also denied that § 87(2)(b) resisted. According to § 87(2)(b)'s chronology of the struggle, § 87(2)(b) stopped resisting once he was brought down.

PO Cruz stated that he pinned § 87(2)(b) down and restrained one of § 87(2)(b)'s arms. PO Cruz added that § 87(2)(b) placed his other arm underneath his body, at which point Sgt. Lefkowitz shocked him. PO Cruz denied that § 87(2)(b) resisted any further while down.

Sgt. Lefkowitz explained that § 87(2)(b) resisted by placing his hands close to his body and refusing to provide them to the officers. Sgt. Lefkowitz added that he shocked § 87(2)(b) once, without eliciting a response, and then shocked § 87(2)(b) a second time. At that point, § 87(2)(b) relented and the officers were able to handcuff him.

According to Patrol Guide section 212-117, Taser guns “should only be used against persons who are actively physically resisting, exhibiting active physical aggression, or to prevent individuals from physically injuring themselves or other person(s) actually present” (See Board Review 32).

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation K – Force: Inside the 41<sup>st</sup> Precinct stationhouse, an officer tightly handcuffed**

§ 87(2)(b)

§ 87(2)(b) stated that, after the fight at the stationhouse, he was handcuffed and then placed into a different holding cell where an unidentified officer further tightened his handcuffs, causing bleeding to his wrists. § 87(2)(b) added that he asked the unidentified officer to loosen the handcuffs and indicated that the officer failed to do so. Attempts to have § 87(2)(b) view a photo array were unsuccessful.

§ 87(2)(b) made no mention of any officer having further tightened § 87(2)(b)'s handcuffs.

Each of the interviewed officers either denied having further tightened § 87(2)(b)'s handcuffs, having observed any officer do so, or remembering this incident.

The medical records confirm that § 87(2)(b) sustained an abrasion to one of his wrists, where dried blood was noted. The records do not specify the shape or origin of the injury.

§ 87(2)(g)

§ 87(2)(g)

**Allegation L – Other: PO Jose Reyes provided a false statement.**

In PO Reyes' CCRB testimony, he stated that § 87(2)(b) matched the description of a suspect with a gun that had come over the radio. PO Reyes testified that the radio communication described the man with the gun as a white man wearing a green shirt, black jeans, and brown boots. PO Reyes also noted in his memo book, "Deft § 87(2)(b) fit description of male white fire-arm green shirt, black jean, brown boots" (See Board Review 24). PO also noted on the Stop, Question and Frisk Report for § 87(2)(b) "Fits description" (See Board Review 10). PO Reyes also wrote in § 87(2)(b)'s arrest report, "At TPO while responding to radio run male w/ gun deft matching description, PO approach deft" (See Board Review 11).

§ 87(2)(b) is a white Hispanic man. He testified that on the date of incident, he was wearing what he described as a turquoise hoodie, blue jeans, and construction boots. He denied wearing any clothing on top of the hoodie and described the hoodie as being completely turquoise colored except for the front pocket which had red, white, and black designs. He denied that his hoodie appeared green. A photo he provided of the hoodie (See Board Review 31), as well as video footage from the incident, show that the hoodie appears blue.

The Event Information print-out indicates that an identified caller, § 87(2)(b), called 911 and reported that an unidentified individual with a gun was in front of 940 East 163<sup>rd</sup> Street. The suspect was described as a male black, wearing a green jacket, green scarf, black jeans and brown boots. The 911 call was made at 8:20 p.m. and PO Reyes and PO Boyce arrived at the scene at 8:25 p.m. A review of the 911 call and subsequent radio communications confirmed that the description of the suspect, provided by § 87(2)(b) was accurately and repeatedly reported over the radio. (See Board Review 08).

According to Patrol Guide section 203-08, the intentional making of a false statement is prohibited, and will be subject to disciplinary action, up to and including dismissal, absent exceptional circumstances (See Board Review 33). The statement must be proven to have been made, material, and intentional. Dep't of Correction v. Centeno. OATH Index No. 2031/04 (2005) (See Board Review 35)

§ 87(2)(g)

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Pod: 14

Investigator: \_\_\_\_\_ Keyne Jean Villert \_\_\_\_\_  
Signature Print Date

Supervisor: \_\_\_\_\_ \_\_\_\_\_ \_\_\_\_\_  
Title/Signature Print Date

Reviewer: \_\_\_\_\_ \_\_\_\_\_ \_\_\_\_\_  
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